IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.11.2007

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition 25223 of 2007

M/s.Mount Metal Engineers
rep. by its Partner A.Nasar
96/6, Mangaliamman Koil Street,
Chennai - 600 016 .. Petitioner

vs.

The Deputy Commercial Tax Officer,
Alandur Assessment Circle,
No.62, Pudupet Street,
Alandur, Chennai - 600 016 .. Respondent

This writ petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the respondent in TNGST.0840779/2003-04, dated 21.5.2007, and quash the same as illegal and against the principles of natural justice and fair play and to direct the respondent to furnish the statement and records relied upon in the revision and provide opportunity of cross examination of third parties.

For petitioner : Mr.D.Trilokchand Chopda
For respondent : Mr.R.Mahadevan
Additional Government Pleader (Tax)

O R D E R

Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), takes notice for the respondent.

2. Heard Mr.D.Trilokchand Chopda, the learned counsel appearing for the petitioner as well as Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), appearing for the respondent.

3. With the consent of the learned counsels appearing on either side, the writ petition is taken up for final disposal.

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4. It is submitted that the petitioner is a dealer in Iron and Steel products and an assessee on the file of the respondent. For the assessment year 2003-04, the petitioner had reported total and taxable turnover of Rs.4,48,24,160/- and Nil, respectively. Even though the respondent had checked and verified the accounts and initialed the same, on 4.8.2005, and completed the assessment proceedings, no assessment order was received.

5. It is further submitted that the place of business of the petitioner was inspected, on 9.12.2004, and a statement was obtained. In the said statement, apart from the other verifications, the details of purchases made from M/s.Shreyansh Ispat (Chennai) Pvt. Ltd., was verified and copies of purchase bills were furnished. Thereafter, the inspecting authorities had once again verified the purchases and initialed the ledger account of Shreyansh Ispat (Chennai) Pvt. Ltd., on 25.4.2006.

6. It is further submitted that the respondent had issued notice, dated 28.2.2007, proposing to revise the assessment proceedings, dated 4.8.2005, for the year 2003-04 on the ground that the purchases made from M/s.Shreyansh Ispat (Chennai) Pvt. Ltd., were found to be not valid by the Enforcement Wing and therefore, the respondent had proposed to disallow the second sale exemption in respect of the said purchases. The respondent had also proposed to make equal time addition towards probable omission and levy maximum penalty, under Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act").

7. It is further submitted that the petitioner had filed the reply, dated 21.3.2007, inter alia, contending that the notice proposing to revise the assessment, on the basis of the report of the enforcement authority, is untenable since as a quasi judicial authority, the revision cannot be made based on the instruction of the higher authorities as held by the the Apex Court as well as this Court. On the other hand, the claim of the purchases was verified at the time of checking of account and only after being satisfied with the original assessment, the proceedings were completed by granting second sale exemption.

8. It is further submitted that even at the time of inspection and thereafter, the inspecting authorities had not found any inconsistency or inaccuracy in respect of purchases made from M/s.Shreyansh Ispat (Chennai) Pvt. Ltd. The reason given in the notice is without any basis and contrary to the records. The petitioner had appeared and produced the accounts and records, which were already verified and initialed by the respondent. Inspite of the specific request made in the objection, the respondent did not furnish any records based on which the revision was proposed or made available to M/s.Shreyansh Ispat (Chennai) Pvt. Ltd. or its Director S.Mahendra Kumar Jain for cross-examination. Therefore, the proposed revision is against the principles of natural justice and fair play, as it is contrary to the records available and without giving an

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opportunity to the petitioner to cross-examine the person concerned and without furnishing the copies of the records and the statements relied upon by the enforcement authorities.

9. Apart from relying on the various grounds stated in the affidavit filed in support of the writ petition, the petitioner had also submitted that denial of the copies of the records and an opportunity of cross-examining the persons, on whose statements the enforcement authorities had arrived at their conclusions, to fasten the liability on the dealers, like the petitioner, is totally against the well established principles of law and contrary to the statutory provisions of the Act as well as the various decisions of this Court and the Apex Court.

10. It has been submitted by the petitioner that the respondent in the above writ petition sought to revise the original assessment order on the basis of the statement of one S.Mahendra Kumar Jain for the levy of tax and penalty on the petitioner. The petitioner had filed an interim objection requesting the respondent to furnish the copies of the records and the statement relied on for the revision of the assessment order and for an opportunity of cross-examining S.Mahendra Kumar Jain, while exercising the power as provided for, under Section 54 of the Act. However, the respondent had passed the impugned order without furnishing the copies of the records requested for and without providing an opportunity of cross-examination. Therefore, the petitioner has been constrained to file the present writ petition raising various grounds which are as follows:

> "a) The order passed without furnishing copies of the records relied upon and without providing an opportunity of cross examination is against the principles of natural justice and fair play and the principles laid down by the Supreme Court and the High Court of Madras.
>
> b) The respondent ought to have initiated action against the witness for failing to appear for cross-examination, in pursuance to the statutory summons issued to them, instead of confirming the proposal on flimsy ground.
>
> c) The petitioner concerned had discharge its burden of proof in support of their purchases at the time of original assessment proceedings and in case of the revision of assessment, the burden is on the respondent as per the provisions of the Act.

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d) The department had accepted the sales made by the sellers and passed the assessment order in their hands for the sales made by them but erred in disallowing the purchases in the hands of the purchasers like the petitioner which is against the provisions of the TNGST Act, and the Rules made thereunder.

e) As per Section 4 of the TNGST Act, the levy of tax on the sale of declared goods is at the point of first sale and the same cannot be shifted on subsequent the seller as per the principles laid down by the Supreme Court in the case of Shanmuga Traders in 114 ST 1.

f) The purchases made were duly accounted for and the same was accepted at the time of the original assessment proceedings. There is no omission or suppression or seizure of incriminating records. The mere disallowance of purchases will not be a ground to attract penalty as per the provisions of the Act.

g) There is no jurisdiction to make estimated addition towards probable omission, under Section 16 of the TNGST Act. As such the further equal time addition in the case of the petitioner in W.P.No.25223 of 2007 is illegal.

h) As per Rule 15(6) of the TNGST Rules, the concurrence of the Deputy Commissioner shall be obtained if the assessment results in imposition of tax of Rs.1,00,000/- and above. Hence, the impugned order without such concurrence is illegal.

i) As per the instructions of Commissioner of Commercial Taxes, the proposal on the basis of inspection are to be deferred till further report is received from the enforcement wing."

11. It is submitted that in similar circumstances, certain assessment orders were challenged before this Court by way of writ petitions filed by the petitioners therein and this Court had passed orders on merits, after hearing the parties concerned, setting aside the impugned orders and by directing the respondents therein to pass orders afresh after furnishing the copies of the records relied on by them and by providing an opportunity of cross-examining the witnesses, on whose statements the impugned orders were passed.

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12. The learned counsel appearing for the petitioner had placed before this Court some of the orders by which such directions had been given. The learned counsel appearing for the petitioner had also cited various decisions of the Supreme Court as well as of this Court in support of his contention that when the principles of natural justice and fair play are not strictly followed, while passing the impugned orders, such orders are not sustainable in law.

13. The learned counsel appearing for the petitioner had cited various decisions including the decision rendered by the Supreme Court in STATE OF H.P. Vs. GUJARAT AMBUJA CEMENT LTD., (2005) 142 STC 1 (SC), which had been followed by the First Bench of this Court in its decision in MURUGAN ENGINEERING PRODUCTS Vs. CTO, COIMBATORE ((2006) 148 STC 419 (Mad)), to point out that the question of alternative remedy could not arise, when the action initiated by the respondents under a provision of law which is ultra vires or when the impugned order had been passed in violation of the principles of natural justice.

14. The learned counsel appearing for the petitioner had also placed reliance on the various decisions of this Court to show that the assessment of tax and penalty made by the assessing authority, relying only upon the statements given by persons, without affording an opportunity of cross-examination of such persons by the petitioner, were invalid in law as being contrary to the principles of natural justice.

15. The learned counsel appearing for the petitioner had relied on an order passed by a learned Single Judge of this Court, dated 7.11.2006, made in W.P.Nos.41902 to 41905 of 2006, wherein the impugned assessment orders were set aside and the respondent was directed to furnish the copies of the documents sought to be relied upon by them, with regard to the case of the petitioner. It had been further directed that if the author of the sworn statements, which were relied on by the Department, was not available for cross-examination, then alone the Department may rely on those statements for arriving at a final assessment. It was also left open to the Department to rely on any other document to arrive at the final assessment and for passing appropriate orders.

16. The learned counsel appearing for the petitioner had also relied on a Division Bench of this Court made in SREE MURUGAN ENGINEERING PRODUCTS Vs. COMMERCIAL TAX OFFICER, COIMBATORE, ((2006) 148 STC 419 (Mad)), wherein it had been held as follows:

> "Lastly, we shall deal with the plea regarding alternative remedy as raised by the Revenue. Except for a period when article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. In Harbanslal Sahnia Vs. Indian Oil

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Corporation Ltd. (2003) 2 SCC 107, the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights or where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In a recent judgment in State of H.P. V. Gujarat Ambuja Cement Ltd., (2005) 142 STC 1 (SC), a three-Judge Bench of the Supreme Court after an exhaustive consideration of the earlier decisions held as follows:

> "..... That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.
>
> 24. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute."

17. Per contra, Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), appearing on behalf of the respondent, had vehemently contested the claims made on behalf of the petitioner. He had submitted that the impugned orders had been issued by the assessing authority based on the various documentary and oral evidence which were available and only after affording a reasonable opportunity to the petitioner.

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18. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent had submitted that prior to the passing of the impugned order, a pre-assessment notice, dated 28.02.2007, had been issued to the petitioner, proposing to assess the turnover relating to the purchases effected from a bill trader as found during an inspection conducted by the Enforcement Wing Officers, on 09.12.2004. On inspection, it was found that the dealers had purchased iron and steel from M/s.Shreyansh Ispat (Chennai) Pvt Ltd., to the extent of Rs.59,64,600/-, during the year 2003-04, against bills without actually handling the goods.

19. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent had also submitted that the assessing authority has not relied upon any statement recorded from the said S.Mahendra Kumar Jain. Instead, he has proceeded to pass orders on the basis of the records recovered during an inspection and also on the basis that the petitioners had not proved that their transactions were second sales and entitled to exemption, under the Tamil Nadu General Sales Tax Act, 1959. Under section 10(1) of Act, the burden of proving that a transaction on any turnover of a dealer is not liable to tax is on such dealer. Therefore, in the circumstances in which the bills issued by the said S. Mahendra Kumar Jain had been produced by the assessee in support of the claim of exemption, the burden is upon the petitioners to prove that there was in reality a sale transaction accompanied by actual handling of the goods and transfer was effected from the seller to the petitioners. However, the petitioners had failed to discharge the burden cast on them. Moreover, the assessment order is not based on the statement recorded from S.Mahendra Kumar Jain but on material records available on record coupled with the fact that the petitioners had failed to prove that the purchases had been carried out in reality. The learned counsel had further submitted that the judgments cited on behalf of the petitioners are not applicable to the facts of the present case.

20. It has also been submitted by the learned Additional Government Pleader (Tax), appearing for the respondent, that the burden of proof that any transaction or turn over of the dealer is not liable to tax shall lie on such dealer only. If a dealer claims that he is not liable to tax on the ground that the sales or purchases are second sales or purchases, he is bound to show that there was an earlier taxable sale or purchase. It was found that the purchases effected by the dealers from M/s.Shreyansh Ispat (Chennai) Pvt. Ltd. were not genuine. In order to evade the demand of tax, the dealers had fabricated the records. In such circumstances, it was proposed to revise the assessment, under Sections 7(A) and 16 of the Tamil Nadu General Sales Tax Act, 1959, and to impose a penalty on the tax due.

21. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent, had submitted that while dealing with matters, similar to those in the above writ petitions, the First Bench of this

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Court, by its order, dated 22.6.2006, made in Writ Appeal Nos.749 and 750 of 2006 and Writ Petition Nos.17575 and 17576 of 2006, had held as follows:

> "Learned counsel for the appellant in these two appeals states that the appellant will resort to the remedy of appeal as per the provisions of the Act and that he will file the statutory appeals within a period of two weeks from today. If the appeals are filed within the said period, subject to pre-condition of deposit of 25% tax component demanded, they will be entertained and decided on merits without raising the issue of limitation. The interim direction issued by the learned single Judge is set aside. The writ petitions are also disposed of. In case no appeal is filed, the Government will be at liberty to recover the taxes as per the impugned order. Both the writ appeals are disposed of. No costs. Connected miscellaneous petitions both in the writ petitions and in the writ appeals are closed."

22. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent, had also submitted that there are many writ petitions filed before this Court in which the same S.Mahendra Kumar Jain is said to have made certain statements before the authorities concerned and had been absconding thereafter. If the impugned orders are set aside by this Court and the authorities concerned are directed to pass orders afresh after giving an opportunity of cross-examining S.Mahendra Kumar Jain, it would be impossible for such authorities to pass fresh orders as the said S.Mahendra Kumar Jain is either absconding or is a non-existent person. The appropriate remedy that would be open to the petitioner is to file an appeal in accordance with the provisions of law.

23. It had also been submitted that even though the petitioner had an opportunity of contesting its case before the respondent by filing all the relevant records and by cross-examining the person who had made the statements based on which the impugned orders are said to have been passed, they had not availed such an opportunity. Even otherwise, the petitioner has an alternative remedy, as contemplated by law, of filing an appeal before the appellate authority concerned to redress its grievance. While so, it is improper for the petitioner to come before this Court by filing a writ petition, under Article 226 of the Constitution of India, to re-open the issue relating to the impugned orders passed by the respondent. In view of the orders passed by the First Bench of this Court, dated 22.6.2006, made in Writ Appeal Nos.749 and 750 of 2006 and Writ Petition Nos.17575 and 17576 of 2006, the present writ petition is to be dismissed.

24. It is seen that the Division Bench of this Court, while considering the cases involving similar facts, had permitted the petitioners therein to file statutory appeals, within a period of two weeks from the date of the said orders, on condition that the petitioners

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deposit 25% of the tax component demanded. On such condition being complied with, the respondent had been directed to entertain and decide the appeals on merits, without raising the issue of limitation. It was also stated that in case no appeal was filed by the petitioner, the Government would be at liberty to recover the tax as per the impugned orders passed by the authorities concerned.

25. Considering the submissions made by the learned counsels appearing on behalf of the parties concerned and on analysing the cases cited and in view of the facts and circumstances in which the present writ petition has arisen, it is seen that the petitioner has an alternate appellate remedy, under the available provisions of law, for the reliefs sought for by them. Once it is accepted that the petitioner has an appellate remedy, it is not open to them to come before this Court by way of filing a writ petition, under Article 226 of the Constitution of India, unless it is clearly shown that the impugned orders have been passed by the respondent by following a law which is ultra vires or that they have been made in violation of the principles of natural justice as held by the Supreme Court in State of H.P. V. Gujarat Ambuja Cement Ltd., (2005) 142 STC 1 (SC). In the present writ petition before this Court, the petitioner has not shown sufficient reason or cause for this Court to set aside the impugned order of the respondent, while a statutory appeal remedy is available to the aggrieved party.

26. In such circumstances, this Court is of the considered view that the said order passed by the Division Bench of this Court, dated 22.6.2006, made in W.A.Nos.749 and 750 of 2006 and W.P.Nos.17575 and 17576 of 2006, would be applicable to the present case. Therefore, the writ petition is dismissed, permitting the petitioner to file a statutory appeal, within a period of two weeks from the date of receipt of a copy of this order, on condition that the petitioner deposits 25% of the tax component demanded. On such condition being complied with, the respondent, after affording necessary opportunity to the petitioner as contemplated by law, is to entertain and decide the appeal on merits, without raising the issue of limitation and pass appropriate orders thereon, on merits and in accordance with law, within a period of eight weeks thereafter. No costs. Consequently, connected M.P.Nos.1 of 2007 are closed.

lan/csh

Sd/-
Asst.Registrar

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Sub Asst.Registrar

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To:

The Deputy Commercial Tax Officer,
Alandur Assessment Circle,
No.62, Pudupet Street,
Alandur, Chennai - 600 016

+1 cc to Mr.D.Trilokchand Chopda, Advocate Sr.No.65733.

+1 cc to The Government Pleader Sr.No.65890.

SP(CO)
dcp/20.11 Writ Petition 25223 of 2007

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